

2/02 Exam Multistate Performance Test - Example 1

Justin, Lindsay & Oh
Attorneys at Law

February 26, 2002

Dear Mr. Austin,

I am writing as attorney for Allie and Bruce Madert. The Maderts are involved in a dispute with their neighbors, Adrian and Evelyn Doyle, who are clients of yours. The Maderts are disturbed by the Doyle's persistent playing of loud rock music on their property which is making it difficult for my clients to enjoy their own home and go about their daily lives.

The Maderts have lived in the quiet, artistic residential community of Windsor for sixteen years. They moved there because of the eclectic mix of people, the artistry, the emphasis on ecology, and because it was a peaceful place to raise their children. A year ago the Doyles moved in next door and have remodeled a shed on their property to be used as a music study for themselves and an ever-changing panolopy of musicians who stop by to play. The building was not made sound proof, nor was the noise buffered in any way, despite the Maderts complaints about noise to the Doyles during the building process.

The music has made it difficult for my clients to enjoy their property. They cannot open their windows, their sleep is disturbed, and their children's activities have been impaired. They have given notice to the Doyles repeatedly, but to no avail.

The Maderts do not wish to take legal action, but they are prepared to do so, if the Doyles do not remedy the situation. If forced to go to court we will seek both an injunction and damages.

The Doyles activities constitute a private nuisance. In Arundel (2000), the Court of Appeals stated that a nuisance can be found where an activity is bothersome because of where it is located, its "surroundings", or the manner in which it is maintained. Such is the case here. Windsor is a "family" community. It is also artist-friendly, but not when the artists disturb the tranquility of the neighborhood. Likewise, in Meadowbrook (1938), the state Supreme Court noted that habitual noise, even if produced by skilled musicians, "which is so loud, continuous, insistent, not inherent to the character of the neighborhood ... that normal people are so seriously incommoded that they cannot sleep, study, read, converse, or concentrate until it stops, is unreasonable," and thus a nuisance. We acknowledge that the Doyles are only a "part-time" rock band, but still believe that Meadowbrook applies. The Maderts suffer from the aforementioned problems and it is to do with your clients' music.

The court will find your clients liable for nuisance if it finds that (1) "the interference is intentional" and either (2) "unreasonable" or (3) "caused by negligent, reckless, or abnormally dangerous conduct." Restatement (Second) of Torts sec.822 (quoted in Arundel). Here, the

interference is intentional because the Doyle's intentionally play the music, despite their knowledge that it is harmful to the Maderts. Likewise, their playing is unreasonably loud because of their failure to muffle the sound. Other musicians in the area are capable of playing without disturbing the community.

Likewise, in Arundel, the court stated that when an individual is on notice and continues the activities, that person is liable for nuisance. The Maderts told the Doyles both orally and in writing that the Doyle's conduct was harming them.

My clients are willing to seek both injunctive relief and damages. The court in Meadowbrook stated that "noise alone may create a nuisance and be the subject of injunction."

As to damages, Gorman (1956) stated that noise causing "physical discomfort and annoyance to those of ordinary sensibilities, tastes and habits and seriously "interfering with the use and enjoyment of homes in that is diminished their value, could be the subject of a case for damages. Here, while we will admit Allie Madert is particularly sensitive to the music because of her previous exposure to the bass guitar, it is clear nonetheless, that the rest of the family (of ordinary sensibilities) were also disturbed by it.

It prevents their "ordinary use and enjoyment" of their home because they are unable to open their windows or sleep. Thus, under Gorman, my clients would ask to be compensated for their "actual inconvenience and physical discomfort."

The Maderts would prefer not to turn to such measures, however. They have a list of alternative measures they wish to propose that the Doyles could take to remedy the problem. And, of course, any suggestions by the Doyles would be greatly appreciated, as well. First, limiting the noise only to weekends, or to times not late at night, at least. Second, the installation of sound buffering glass and walls in the shed and acoustical shades on the windows. If this was done, also a requirement then that the Doyles only practice in this location. Third, a limit on the number of other musicians allowed to play there or perhaps limiting it to those "in the band." Fourth, a limit on the decibel level of the music. And finally, if these are ineffective, a requirement that the band go to one of the nearby artists' cooperatives or community centers to play.

I look forward to hearing from you and your clients.

Sincerely,

Sarah Lindsey

2/02 Exam Multi-state Performance Test - Example 2

Letterhead

George Austin

[Address]

Re: Adrian and Evelyn Doyle
211 Westland Rd.
Oaton, Franklin 33329

Dear Mr. Austin,

My clients, Allie and Bruce Madert, have consulted with me regarding a problem they are having with their neighbors, the Doyles. After discussing the problem with the Doyles, my clients were told to contact you. It is my clients' and my own sincere hope that we can resolve this matter without the expense of litigation.

By way of background, the Doyles recently moved into the Windsor section of Franklin, a quiet old residential community most non-neighborhood traffic avoids, because of their speed bumps. The Doyles soon converted a shed into their backyard into a studio space for their band, as well as other musicians, apparently. Their improvements to the shed (skylight, bigger windows, sheet rocking the interior) may or may not meeting zoning ordinances and the city building codes, but they certainly have done nothing to contain the noise.

The Doyles, who have apparently started a rock band, and booked professional gigs, have made a habit of practicing their music until late hours, on at least one occasion until after 3 a.m., the drums and bass reverberating off my clients home.

Although my clients, who live next door, were told by the Doyles that the noise would diminish once construction of the "studio" was completed, my clients have experienced no diminution in the noise level, exacerbated perhaps by the shed apparently having no insulation, the enlarged windows, with shades not designed to reduce the noise, and the relatively small, unobstructed space (12 feet separates the houses) between our clients' homes.

The Doyles have suffered sleep deprivation that is affecting many aspects of their lives, including work performance and the childrens' school and other activities.

My clients have complained, both by letter, which I enclose, and by discussing the matter directly with the Doyles, hoping to reach a sensible solution, but the Doyles have simply referred them to you.

From what my clients tell me, your clients appear to be sensible people who are apparently unaware of both the law and the legal remedies available to my clients.

On the facts provided, I believe my clients would be entitled to both injunctive relief and money damages, with the possibility of punitive damages. Noise alone may create a nuisance and be the subject of an injunction. Meadowbrook Swimming Club v. Albert [citation omitted]. As Franklin courts hold, any habitual noise, even produced by skilled musicians, which is “so loud, continuous, insistent, not inherent to the character of the neighborhood... that normal people... cannot sleep, study, read, converse... is unreasonable.” That is precisely what is occurring here, the same type of damage that led the court in Meadowbrook to uphold an injunction.

Likewise, Franklin courts have upheld awards of damages in similar cases for 1) the diminution in value of the use of property as a home; 2) any actual inconvenience and physical discomfort; 3) any sickness or ill health caused by the annoyance. Gorman v. Sabo

In addition, where the court finds the nuisance deliberately harassing, as in Gorman, and where at least nominal damages are awarded, punitive damages are recoverable. Id. You may note that Franklin courts find intentional conduct in similar situations does not require ill will or malice, but merely continuing to engage in conduct constituting the nuisance after being put on notice of the harm caused by the activity, which applies here to your clients. See, e.g., Arundel Fish & Game Club v. Carlucci. You may also note from that case that if your clients should be deemed to be engaging in commercial activity (they are playing professional “gigs” and apparently allow other professionals to use the studio), then the Franklin Code of Regulations, FCR 26-01 through 26-59, places maximum permissible noise levels for such commercial enterprises operating on residential land.

But, as I stated previously, my clients would like to resolve this matter without litigation. In that spirit, I also enclose a study done at the University of Franklin that partly concerns abetting noise problems, using various noise attenuation devices (building facades, wall barriers, acoustical glass and construction, buffers, internal noise barriers.)

It is my hope, as well as my clients, that this report will act as a stimulus for discussions between the parties concerning methods of reducing the noise levels. After all, a Franklin court would likely require no less. See Meadowbrook, id. As a beginning step, however, my clients insist that your clients limit their practice times to no later than 10 p.m. and to their own (not other musicians’) necessary practice.

Please contact me as soon as you have discussed this with your clients.

Cordially,

Sareh Lindsey
Justin, Lindsey & Oh

2/02 Exam Multi-state Performance Test - Example 3

February 26, 2002

Justin, Lindsay & Oh
Attorneys at Law
47 Montgomery Avenue
Dakota, Franklin 33311

Dear Mr. Austin:

I have been retained by Allie and Bruce Madert to negotiate a resolution to the difficulties currently existing between my clients and your clients, Adrian and Evelyn Doyle.

My clients have lived for 16 years next door to the home recently purchased by Mr. & Mrs. Doyle. The Doyles' property includes a shed that they have renovated and use as a rehearsal studio for their rock band throughout the day and night. The studio, with its normal construction and large windows, allows an undiminished volume of sound to reach the home of my clients to such an extent that they and their children are unable to sleep properly, open their windows for ventilation, or enjoy their restored Victorian home, which is comfortably situated in the local historic district.

My clients have made several verbal and one written request to your clients that the musical practice take place during the day and/or that some sort of shielding be placed to dampen and control the noise. Your clients not only have ignored all such requests but also have begun to have practice sessions with large groups of persons, sometimes as many as 8, that continue until the early hours of the morning. My clients are prepared to seek all remedies available including but not limited to injunction and damages for diminution in value.

This type of noise clearly meets the standard for private nuisance defined in the Restatement (Second) of Torts sec. 822 in that it is "(a) intentional and unreasonable, or (b) unintentional and otherwise actionable under the rules controlling liability for negligent or reckless conduct, ..."

The Franklin Supreme Court has defined intentional as actions that take place after an actor has been put on notice concerning the harm of certain activities and continues to engage in them with knowledge of the harm. Lawrence v. Simm's (1995). Your clients have been given both oral and written notice of the invasion created by the music and the harm that arises from this invasion. Because they have notice and continue to act, their acts rise to the level of intentional nuisance and may be subject to injunction.

In Arundel Fish & Game Club v. Carlucci the Franklin Court of Appeals upheld an injunction that utilized the Franklin standards as set forth in FCR sec. 26-01-26-59 defining permissible noise levels. Although these standards do not control residential noise levels, arguably your clients' band is a commercial endeavor which uses residential land as a place to practice, and

the standards would govern noise emanating from the studio. Even if the Court were to find that it is not a commercial enterprise, the standards may serve as guidelines for the Court in providing injunction relief. Under either analysis my clients could seek and would most likely be granted injunctive relief that would, at the least, restrict your clients' practice to reasonable hours and noise levels, or, at the most, prohibit any practice at all in their studio.

Before the Doyles purchased the home next to them, my clients had enhanced the value of their home by completely restoring it to complement the historic district where it is located. Both the restoration and the location added to the value of the home. However, the continuous noise created by your clients, seriously interferes with the ability of Mr. & Mrs. Madert to quietly enjoy the comfort of their home. Any non-trespassory invasion of rights in ... a home which constitutes a private nuisance, may be measured for the purpose of damages by the diminution in value. Gorman v Sabo (Franklin Ct. of App. 1956). A plaintiff is not limited to the recovery of the diminished value but may also be compensated for any actual inconvenience and physical discomfort that materially affected the comfortable and healthful enjoyment of the home. Id. My clients and their children suffer from sleep deprivation. Their home is no longer a refuge but a place where they suffer constant exposure to high levels of discordant noise. They cannot use their yard nor can they open their windows without the unwelcome intrusion of uninvited noise. Because they are entitled to compensatory damages, they may also seek punitive damages. Id.

My clients are persons who enjoy music and other artistic endeavors. However, a constant bombardment of a high volume of music, no matter how skillfully performed, would offend even the most reasonable person. See Meadowbrook Swimming Club v. Albert (1938). Because the noise endured by my clients on a daily and nightly basis produces unreasonable physical discomfort, which prevents sleep, leading to both physical and mental problems, see Noise Pollution and Control. U. of F (1998), the Court would be willing to grant any remedies they might seek including punitive damages based on the notice you have had.

However, my clients would prefer to settle the matter without litigation if possible. Therefore they ask that your clients agree to take the following steps to alleviate the problem.

First, my clients would like the playing of music to cease at 10:00 p.m. every night and the begin after 9:00 a.m. during the week and after 2:00 p.m. on the weekend. This would allow my clients time for sleeping and for other family activities.

Second, they would like your clients to add sound proofing materials and windows to the studio which would diminish the volume of the noise intruding into my clients residence.

Third they ask that a sound barrier of either a wall or fast growing plants be placed around the studio.

Fourth, my clients ask that decibel meters be installed and monitored to ensure that no noise above the level of 55db crosses onto their property.

Fifth, my clients ask that your clients utilize the rehearsal facilities provided by the

community as much as possible. This would provide an inexpensive and convenient way to resolve the problem.

Finally, my clients ask that they be notified if large groups will be rehearsing and that they be allowed to object.

I hope that we will be able to resolve these issues in a mutually satisfactory manner. Please respond to this letter no later than 30 days from today so that my clients may reevaluate the situation and decide how to proceed to that time.

If you have questions or concerns about the above, please do not hesitate to call me.

Sincerely,